IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 2150 of 2003
With
CIVIL APPLICATION No. 7297 of 2003
In
FIRST APPEAL No. 2150 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE P.B.MAJMUDAR

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KANUBHAI HARGOVINDDAS DAVE
Versus
JAYDEVSINH KALYANSINH CHAUHAN

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Appearance :
NOTICE SERVED for Appellant
MR D.R. DALAL for Respondents.

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CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR

Date : 10/07/2006

ORAL JUDGMENT

Advocate for the appellant having been elevated as a Judge of this Court, the Registry had issued notice to the appellant, and although the said notice is served long back, the appellant has not engaged any advocate nor has appeared in person to conduct the Appeal.

Mr. D.R. Dalal, learned advocate appeared for the respondent and has argued the matter on behalf of the respondent.

The present First Appeal is filed by one Kanubhai Hargovinddas Dave, who is the original opponent of Probate Application No. 14 of 2002 and original applicant of Review Application No. 36 of 2002.

The present respondent has preferred Probate Application No. 14 of 2002 before the Civil Judge, Senior Division, Surat. In the aforesaid application, the present appellant gave an application Exh. 14 under sections 19 and 20 of the Civil Procedure Code on the ground that the property of the deceased testator is situated within the territorial jurisdiction of Valsad Court, and since no property of the deceaed testator is situated within the territorial jurisdiction of Surat Court, the said Probate Application may be rejected on the ground that the Court at Surat has no territorial jurisdiction to decide the same. The learned trial Judge, by his order dated 17.01.03

rejected the said application Exh.14 as the Court found that part of the property is situated within the territorial limit of the Court and it was, therefore, held that both the Courts, i.e. the Courts at Surat and Valsad, have got jurisdiction to decide the same. The present appellant thereafter preferred Review Application No. 36/03 by invoking the provisons of Order 47 of the Civil Procedure Code. The learned trial Judge rejected the said application. Being aggrieved by the aforesaid order passed by the trial Judge rejecting the Review Application, this First Appeal is preferred. However, while challenging the said order passed by the trial Court in Review Application, a reference is also made to the order passed below Exh. 14 by which the learned trial Judge came to the conclusion that it has jurisdiction to decide the Probate Application. In the appeal memo, the appellant has stated as under:

> "Being aggrieved and dissatisfied by the order dated 8th August, 2003, passed by the Third Joint Civil Judge (S.D), Surat in Review Application No. 36 of 2003 whereby the Ld. Civil Judge rejected the Review Application preferred by present appellant without considering documents on record and exceeded its jurisdiction assigning reasons which were not part of the plaint or any circumstantial evidence and the order dated under Exhibit-14 dated 17.02.2003 rejecting the preliminary objection of jurisdiction raised by the appellant, the appellant prefers the present appeal on the following amongst other grounds".

So far as the order passed below Exh.14 is concerned, the same deals with an application submitted by the present appellant in Probate Application No. 14 of 2002. In the said application, on behalf of the appellant, it was contended that the Civil Court at Surat has no territorial jurisdiction to decide

the Probate Application as the property of the testator is not situated within the local limits of Surat. The said application Exh.14 was filed under Section 19 and 20 of the Civil Procedure Code. The learned trial Judge, by order dated 17.02.03 rejected application Exh.14 in Probate Application No. 14 of 2002. Thereafter the present appellant submitted the aforesaid review application and in the title of the said application, it is stated that the said application is under section 114 of the Civil Procedure Code. As stated earlier, the learned trial Judge, by an order dated 08.08.03 rejected the prayer of the present appellant to review the order dated 17.02.03 passed below Exh.14 in Probate Application No. 14 of 2002. Aggrieved by the order dated 08.08.03 passed in the Review Application, the present appeal is filed.

It is required to be noted that this appeal is filed challenging essentially the order dated 08.08.03 in Review Application No. 36 of 2003 filed by the present appellant. Learned advocate Mr. Dalal submitted that so far as the order rejecting the review application is concerned, the same is not appealable under the provisions of Order 47 Rule 7 the Code of Civil Procedure. Order 47 of the Civil Procedure Code pertains to Review, and Rule 7 thereof reads as under:

> "7. *Order of rejection not appelable. Objections to order granting application.*
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> (1). An order of the Court rejecting the application shall not be appealable; xxx xxx"

As pointed out earlier, in the Probate Application, application Exh.14 was given under sections 19 and 20 of the Civil Procedure Code for rejecting the Probate Application on

the ground of territorial jurisdiction. In my view, neither of the said orders, i.e. the order passed below the interlocutory application Exh.14 nor the order passed in the Review Application is appealable, and, therefore, the First Appeal is not competent at all.

The main proceedings are in connection with a probate proceedings. Section 299 of the Indian Succession Act 1925 [hereinafter referred to as the Act] provides for appeal, which reads as under:

> "299. Every order made by a District Judge by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), applicable to appeals."

In the present case, the order rejecting the Review Application is not appealable under Order 47 of the Code of Civil Procedure Code because as per the provisions of sec. 299 of the Indian Succession Act appeal is required to be preferred in accordance with the provisions of the Code of Civil Procedure applicable to appeals. So far as the first order passed below Exh14 is concerned, it is under sections 19 and 20 of the Civil Procedure Code and not under any provisions of the Indian Succession Act, and by the said order passed at an interlocutory stage, the Court came to a conclusion that it has jurisdiction to decide the Probate Application. The said order is, therefore, not appelable as the same is purely an interlocutory order in nature. As the aforesaid order can be said to be an order passed in connection with application under sections 19 and 20 of the Civil Procedure Code, it cannot be

said to be a substantive order governing rights of the parties under the Indian Succession Act.

In the case of MAHARANA MILLS vs. HARVADAN reported in 13 GLR 522, this Court has considered the question of filing Revision under the Rent Act before the District Court. In the aforesaid judgment, learned Single Judge has held in paragraph 7 that in order to determine whether an interlocutory order is appealable or revisable, the test which must be applied is: What is the subject matter of the order?, and, does the order affect the substantive rights of the parties? The learned Single Judge further observed that there are some orders which may be under the provisions of CPC, the subject matter of which is not govered by any of the provisions of the Rent Act, and such orders do not attract the substantive rights of the parties under the Rent Act. The learned Judge has also given illustration of procedural orders which do not affect the substantive right of parties to the litigation, such as leave to amend, production of documents, issuance of commission for examination of witness etc. In paragraph 8, the learned Single Judge observed as under:

> “8. It is true that sec. 29(3) uses the expression “order”. Orders may be interim or final. Orders may be such which bear indelible imprint of the Bombay Rent Act or they may be such which do not. If there is an interim order or an interlocutory order which is made in a suit government by the Bombay Rent Act, and if it affects the substantive rights of a party under the Bnombay Rent Act, or the subject matter of

> which is governed by the Bombay Rent Act, such an order is revisable by the District Court under sec. 29(3). In my opinion, therefore, purely procedural orders which do not affect the substantive rights of a party under the Bombay Rent Act or the Rules made thereunder or the subject matter of which is not governed by the Bombay Rent Act or the Rules made thereunder are not the orders which attract the revisioinal jurisdiction of the District Court under sec. 29 of the Bombay Rent Act. The order which the learned Trial Judge has passed belongs to this category. It was, therefore, not revisable by the learned District Judge. He had no jurisdcition to entertain the revision application and to pass any order on merits therein. In that view of thematter, the impugned order made by the learned District judge is liable to be set aside."

As pointed out earlier, when Review Application is rejected, under Order 47 of CPC the appeal is not competent, and, therefore, this First Appeal is not competent by which the order of rejection of review application is challenged. Similarly, so far as the order below Exh.14 is concerned, the same is also a procedural order under the CPC as by invoking sections 19 and 20 of CPC, it is prayed that the trial Court has no territorial jurisdiction. It cannot be said that any substantive rights under the Indian Succession Act is decided by the trial Court. The learned trial Judge has also rightly found that part of the property of the testator is situated within territorial jurisdcition of the Surat Court and, therefore, the Surat Court has also

jurisdiction to decide the application in question. Particulars of such property which is coming within the territorial jurisdiction of the Surat Court is also refered to in the said order.

Considering the aforesaid aspect of the matter, the appeal is devoid of any merit and Mr. Dalal has rightly argned that the proceedings are instituted by the appeallant only with a view to delay the Probate proceedings. The appeal is, therefore, required to be dismissed as not maintainable since the order below Exh.14 is only a procedural order under the CPC and no substantive rights under the Indian Succession Act is decided by that order, and, the order rejecting the review application is not appealable under the provisions of Order 47 Rule 7 the Code of Civil Procedure. The appeal is, therefore, dismissed.

Registry is directed to forthwith return the R & P of Probate Case No. 14 of 2002 and Review Application No. 36 of 2003 to the concerned Court. In view of the fact that the probate proceedings are pending since long, the trial Court is directed to decide the Probate Application as early as possible, without any further delay.

In view of the above order passed in the main First Appeal, no further orders are required to be passed in the Civil Application. Notice is discharged. Ad-interim relief granted earlier stands vacated forthwith.

[P. B. MAJMUDAR, J.]

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